

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT L. MARINI,  
Plaintiff,

No. C 06-5491 CW

v.

ORDER DENYING  
WITHOUT PREJUDICE  
DEFENDANTS'  
MOTION TO DISMISS  
OR TRANSFER

SAMUEL CABOT INCORPORATED EMPLOYEES'  
STOCK OWNERSHIP PLAN, formerly known  
as SAMUEL CABOT INCORPORATED  
EMPLOYEES' STOCK OWNERSHIP AND  
SAVINGS PLAN; SAMUEL CABOT  
INCORPORATED, a Massachusetts  
corporation, as sponsor and as  
administrator of the Samuel Cabot  
Incorporated Employees' Stock  
Ownership Plan; SAMUEL CABOT III,  
individually and as former trustee of  
the Samuel Cabot Incorporated  
Employees' Stock Ownership Plan;  
WILLIAM F. MCGONIGLE, JR.,  
individually and as trustee of the  
Samuel Cabot Incorporated Employees'  
Stock Ownership Plan; THE VALSPAR  
CORPORATION, a Delaware corporation,  
as administrator of the Samuel Cabot  
Incorporated Employees' Stock  
Ownership Plan; CHRISTOPHER CABOT,  
individually and as fiduciary of the  
Samuel Cabot Incorporated Employees'  
Stock Ownership Plan; SULLIVAN &  
WORCESTER LLP, a limited liability  
partnership,

Defendants.

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1 Defendants move for dismissal of this action pursuant to  
2 Federal Rules of Civil Procedure 12(b)(2) and 12(b)(3). In the  
3 alternative, Defendants move under 28 U.S.C. § 1404(a) to transfer  
4 the action to the District of Massachusetts, where Defendants  
5 previously filed a related action against Plaintiff. Plaintiff  
6 opposes the motion. Having considered the parties' papers, the  
7 Court denies without prejudice Defendants' motion to dismiss or  
8 transfer the action.

9 The well-established first-to-file rule provides that "where  
10 substantially identical actions are proceeding in different courts,  
11 the court of the later-filed action should defer to the court of  
12 the jurisdiction of the first-filed action by either dismissing,  
13 staying, or transferring the later-filed suit." SAES Getters  
14 S.p.A. v. Aeronex, Inc., 219 F. Supp. 2d 1081, 1089 (S.D. Cal.  
15 2002).

16 It is undisputed that Defendants filed their original  
17 complaint in the Massachusetts district court on August 16, 2006,  
18 three weeks before Marini filed his complaint in this Court. It is  
19 also undisputed that the Massachusetts action and this action  
20 involve the same parties and the same subject matter, the sale of  
21 Marini's stock upon his retirement from the Company.<sup>1</sup>

22 Marini argues that the first-to-file rule does not apply to  
23 this case because he alleges "Defendants have demonstrated bad  
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26 <sup>1</sup>Defendants argue, and Marini does not dispute, that the  
27 additional claims that Marini brings in this Court either relate to  
28 the actual sale of his stock or to the suit in the Massachusetts  
district court.

1 faith by imposing unnecessary additional costs on Marini. They  
2 have filed an anticipatory suit. And they have maneuvered in hopes  
3 of avoiding this forum." Opposition at 15. Defendants counter  
4 that, in addition to the first-to-file rule, all of the factors  
5 underlying the decision to transfer a case under 28 U.S.C.  
6 § 1404(a) warrant transfer of the case to Massachusetts.

7 Even if the first-to-file rule should not be applied in this  
8 case because the first-filed suit was anticipatory and filed in bad  
9 faith for forum-shopping purposes, those arguments should be  
10 addressed to the court in the first-filed action. Alltrade Inc. v.  
11 Uniweld Products, Inc., 946 F.2d 622, 628 (9th Cir. 1991);  
12 Pacesetter Sys., Inc. v. Medtronic, Inc., 678 F.2d 93, 96 (9th Cir.  
13 1982). Therefore, the Court defers to the Massachusetts district  
14 court to decide the appropriate forum. Because Marini has already  
15 filed a motion to transfer the Massachusetts action, this Court  
16 DENIES without prejudice Defendants' motion (Docket No. 4), pending  
17 the Massachusetts district court's ruling on Marini's motion to  
18 transfer.<sup>2</sup>

19 The parties are instructed to notify the Court promptly upon  
20 entry of an order in the pending action in the Massachusetts  
21 district court. If the Massachusetts district court grants  
22 Marini's motion to transfer the first-filed action, the actions  
23 will be related and consolidated and Defendants may renote their  
24 motion to dismiss if there remain grounds to do so. If the  
25 Massachusetts district court denies Marini's motion to transfer,

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27 <sup>2</sup>The Court GRANTS Defendants' request for judicial notice  
(Docket No. 8).

1 Defendants may renote their motion to dismiss and the Court will  
2 either dismiss this action, stay it, or transfer it to the  
3 Massachusetts district court.

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5 IT IS SO ORDERED.

6 Dated: 10/31/06



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CLAUDIA WILKEN  
United States District Judge